U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: **March 3, 1999**
Case No.: **1997-INA-481**

In the Matter of:

ELAIN BUNZEL,
Employer,

on behalf of

OFELIA HERNANDEZ-MENDEZ,
Alien.

Appearances: Thomas A. Lavin
Santa Ana, California
for Employer and Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Burke, Guill, Holmes, Huddleston, Jarvis, Lawson, Neusner, Wood, and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification on behalf of Alien Elain Bunzel, ("Alien"), filed by Employer Ofelia Hernandez-Mendez, ("Employer"), pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.[1]

[1] This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On May 16, 1995, Employer filed an application for labor certification to enable Alien to fill the position of Cook, Domestic Service. (AF 23).

The CO issued a Notice of Findings ("NOF") on March 26, 1996, proposing to deny certification for failure to establish that the job offer meets the definition of "employment" as defined at 20 C.F.R. § 656.3; failure to establish that the job is truly open to U.S. workers, pursuant to 20 C.F.R. § 656.20(c)(8); failure to document the ability to pay the offered wage, plus overtime, pursuant to 20 C.F.R. § 656.20(c)(1) and 20 C.F.R. § 656.20(c)(4); and failure to document lawful related reasons for the rejection of U.S. workers, pursuant to 20 C.F.R. § 656.21(b)(6). (AF 11-15).

Employer, through counsel, submitted a rebuttal on April 16, 1996. (AF 6-9). However, the rebuttal fails to address any of the specific requests made by the CO. Rather, Employer argues that the NOF "was clearly an abusive decision and an infringement of other U.S. Government Agencies who have already been designed by regulations to oversee various points brought out in [the] NOF." (AF 6). Employer contests, *inter alia*, the CO's authority to make the documentary demands listed in the NOF, stating that such documentation is "absolutely not material" in light of pre-BALCA Administrative Law Judge decisions[2] that hold it is beyond the CO's authority to determine whether the duties to be performed are necessary or whether they could be performed in less than 40 hours per week. (AF 7). Employer also accuses the CO of an "abusive breach of established regulations", finding that it is "INS and not USDL [which] has been designated as the Federal agency to establish whether" an employer has sufficient funds to pay the wage offered. (AF 8).

The CO issued the Final Determination ("FD") on April 29, 1996, (AF 2-5), denying certification because Employer failed to document that a bona fide, full-time job opportunity exists. (AF 5).

On May 13, 1996, Employer filed a request for review. (AF 1). On July 22, 1997, the CO forwarded the record to the Board of Alien Labor Certification Appeals ("Board"). Employer's statement of position, which is virtually a reiteration of its rebuttal, was received on September 22, 1997.

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[2] Employer cited the pre-BALCA decisions of *M. Ganesa Pandian*, 1987-INA-110 (Mar. 31, 1987), and *Ava Capossela*, 1986-INA-342 (June 24, 1986).

DISCUSSION

While pre-BALCA decisions may have intrinsic persuasive value, they are not binding on the Board. *Artdesign, Inc.*, 1989-INA-99 (Dec. 5, 1989); *Aurora Gumanit*, 1997-INA-483 (Jan. 28, 1998) (*per curiam*). Employer's attorney, in his statement of position and rebuttal to the NOF, cites and makes reference to several pre-BALCA cases in support of his position. We have held, however, that such decisions are not binding upon the Board and to the extent any of the pre-BALCA decisions conflict with our decision today, we decline to follow them. *See id.* Thus, contrary to Employer's argument that it is beyond the CO's authority to make a determination concerning whether the duties to be performed are necessary or whether they could be performed in less than 40 hours per week, a CO may reasonably inquire into whether a job constitutes full-time employment. However, it is important to note that in today's *en banc* decision in *Daisy Schimoler*, the Board holds that there is little relevance for purposes of the section 656.3 definition of employment in whether the worker's duties require constant work for the entire work day, provided that the work day is customary for a full-time employee in the industry or under an employer's special circumstance. *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*). Accordingly, if a CO's questions about the full-time nature of the duties are, in reality, a requirement that the employer establish the "business necessity" for the position, the inquiry is not reasonable. *See id.* at 4 n.6. Nevertheless, a CO may reasonably ask for the same type of information in an analysis of a *bona fide* job opportunity, under the totality of the circumstances test, pursuant to 20 C.F.R. § 656.20(c)(8), as cited in this case. *See today's decision, Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). *Schimoler* does not change the CO's authority to inquire about the employer's ability to offer permanent, full-time work,[3] which was also an inquiry made by the CO in this case. Further, an employer must provide documents reasonably requested by the CO relating to the sufficiency of funds to pay the alien's salary.[4]

Where the CO requests a document or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification.[5]

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[3] *See, e.g., Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989) (existence of permanent, full-time employment not shown where the CO requested evidence of the source of the employer's funds and income in the last year, and the employer failed to produce it); *see also Schimoler, supra, at 4 and n. 7.*

[4] *See, e.g., O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996) (denying certification where Employer failed to provide information questioning whether the Employer could pay the offered salary).

[5] Note also that Employer has the burden to satisfactorily respond or rebut to all findings in the NOF. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Failure to address a deficiency noted in the

John Hancock Financial Services, 1991-INA-131 (June 4, 1992); *See also Ramsinh K. Asher*, 1993-INA-347 (Nov. 8, 1994) (denying labor certification where the CO requested specific information to document full-time employment of household cook and Employer responded only with general objection to providing any such information); *Michael Aquino Landscaping & Gardening*, 1992-INA-38 (Aug. 2, 1993) (denying certification where Employer failed to submit requested payroll records to demonstrate that its landscapists worked year round); *Rocco Parente*, 1992-INA-248 (Aug. 2, 1993) (denying certification where Employer failed to submit requested payroll records to demonstrate that landscapists worked year round).

In this matter, Employer responded to the NOF with bare assertions and reference to pre-BALCA cases. Employer's assertions, unsupported by reasoning or evidence, do not carry its burden of proof. *See Neil Clark*, 1995-INA-92 (Jan. 27, 1997).

Accordingly, we find the CO's denial of certification was proper.

ORDER

IT IS ORDERED that the Certifying Officer's denial of labor certification is **AFFIRMED**.

JOHN M. VITTONE
Chief Administrative Law Judge

Donald B. Jarvis, Administrative Law Judge, concurring:

I concur in the result. I agree with the holding that Employer did not carry her burden of proof and certification should be denied. However, the decision relies in part on *Carlos Uy III*, 1997-INA-304 and *Daisy Schimoler*, 1997-INA-218, both decided this day. For the reasons set forth in my concurring opinion in *Carlos Uy III* and my dissent in *Daisy Schimoler*, I do not join in the majority opinion.

NOF supports a denial of labor certification. *Id.; see also Prace Fabrication Corp.*, 1993-INA-179 (Mar. 1994) (denying certification for failure to respond to CO's request for documentation of ability to offer full-time employment).